ABDUL MANAP MOHAMAD HASSAN

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CRIMINAL APPEAL NO: W-05-61-97]
5 AUGUST 2003

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in a dangerous drug - Presumption of trafficking under s. 37(da) - Whether may only be invoked solely on the basis of an express and affirmative evidential finding of possession - Whether may be invoked based upon presumption of possession in s. 37(d) if there is concurrent evidential finding of possession - Obligations of trial judge - Whether conviction under s. 39B should be substituted with one under s. 12(2)*

This was the defendant's appeal against his conviction and death-sentence under s. 39B of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 69.02g of heroin. In coming to the conclusion that the defendant was trafficking in heroin, the trial judge had, first, invoked the 'presumption of possession' under s. 37(d) DDA against the defendant on account that he was in custody and control of the heroin that was found on his body and clothing. Grounded upon this statutory presumption of possession, the trial judge then proceeded to invoke the 'presumption of trafficking' in s. 37(da) DDA against the defendant on account that the amount of heroin that was found on him was more than 15g.

Held (allowing the appeal):
Per Mokhtar Sidin JCA

[1] The presumption of trafficking in s. 37(da) DDA can only be invoked on the exclusive basis of an express and affirmative **evidential finding of possession** – as understood in criminal law – and **not** upon a statutory presumption of possession such as s. 37(d) DDA. The trial judge had thus fallen into error when he found the defendant guilty of trafficking in a dangerous drug based on the presumption of trafficking in s. 37(da) DDA which he invoked and applied on top of the presumption of possession in s. 37(d) DDA which he had earlier invoked. (*Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170 FC followed.) (pp 645 g-h & 646 a-g)

[2] In addition, so long as the presumption of possession in s. 37(d) DDA has been invoked or applied, the presumption of trafficking in s. 37(da) DDA cannot be invoked **even if** the trial judge has also made a finding of possession on the evidence. A trial judge who makes a finding of possession on the evidence and, at the same time, applies the presumption of possession in s. 37(d) DDA seriously misdirects himself and leaves the appellate court in grave **doubt** as to whether his subsequent invocation of the presumption of trafficking in s. 37(da) DDA was based exclusively upon an 'express and affirmative evidential finding of actual possession' or upon the statutory presumption of possession in s. 37(d) DDA. Hence, where there is evidence of actual possession of a dangerous drug, the trial judge should make a positive finding of such possession and **not** rely on the statutory presumption of possession in s. 37(d) DDA. (*Haryadi Dadeh v. PP* [2000] 3 CLJ 553 FC followed.) (p 649 a-h)

[3] In the present case, there was no evidence of actual possession on the part of the defendant nor did the trial judge make an express and affirmative finding of such possession. Instead, the trial judge had invoked and relied upon the presumption of possession in s. 37(d) DDA to apply the presumption of trafficking in s. 37(da) DDA against the defendant. This was a serious misdirection and one that was fatal to the charge of trafficking in a dangerous drug under s. 39B DDA. (pp 647 h & 650 a)

[Conviction and sentence under s. 39B DDA quashed and set aside; defendant found guilty of possession under s. 12(2) DDA and sentenced to 16 years' imprisonment and 10 strokes of the rattan under s. 39A(2) DDA.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Rayuan ini merupakan rayuan defendan terhadap sabitannya dan hukuman mati dibawah s. 39B Akta Dadah Merbahaya 1952 ('ADM') untuk pertuduhan mengedar 69.02g heroin. Dalam membuat kesimpulan bahawa defendan mengedar heroin, hakim perbicaraan telah, pertamanya, menggunakan "anggapan milikan" dibawah s. 37(d) ADM terhadap defendan atas sebab heroin tersebut dibawah jagaan dan kawalan defendan kerana dijumpai pada badan dan pakaian defendan. Berdasarkan anggapan milikan berkanun ini, hakim perbicaraan kemudiannya menggunakan anggapan mengedar dibawah s. 37(da) ADM terhadap defendan kerana jumlah heroin yang dijumpai pada diri defendan melebihi 15g.

Diputuskan (membenarkan rayuan):
Oleh Mokhtar Sidin HMR

[1] Anggapan mengedar dibawah s. 37(da) ADM hanya boleh digunakan berdasar dapatan keterangan yang nyata dan jitu – sebagaimana yang difahamkan di dalam undang-undang jenayah dan bukan berdasarkan anggapan milikan berkanun seperti s. 37(d) ADM. Hakim perbicaraan telah membuat kesilapan apabila beliau mendapati defendan bersalah mengedar dadah merbahaya berdasarkan anggapan mengedar dibawah s. 37(da) ADM yang mana telah digunakan dan dipakai olehnya bersama dengan anggapan milikan dibawah s. 37(d) ADM yang mana telah gunakannya terlebih dahulu. (*Muhammed Hassan lwn. Public Prosecutor* [1998] 2 CLJ 170 FC diikuti.)

[2] Tambahan lagi, selagi anggapan milikan dibawah s. 37(d) ADM digunakan atau dipakai, anggapan mengedar dibawah s. 37(da) ADM tidak dapat digunakan walaupun hakim perbicaraan juga membuat dapatan milikan pada keterangan. Seseorang hakim perbicaraan yang membuat dapatan milikan pada keterangan dan, pada masa yang sama, memakai anggapan milikan dibawah s. 37(d) ADM dengan seriusnya telah membuat satu salah arah terhadap dirinya sendiri dan ini menimbulkan kesangsian yang berat kepada mahkamah rayuan sama ada penggunaan beliau berkenaan anggapan mengedar dibawah s. 37(da) ADM adalah didasarkan secara ekslusifnya pada satu "dapatan keterangan yang nyata dan jitu mengenai milikan sebenar itu" atau pada anggapan milikan berkanun dibawah s. 37(d) ADM. Oleh yang demikian, apabila terdapat keterangan mengenai milikan sebenar sesuatu dadah merbahaya, hakim perbicaraan hendaklah membuat satu dapatan yang positif berkenaan milikan tersebut dan tidak bergantung kepada anggapan milikan berkanun dibawah s. 37(d) ADM. (*Haryadi Dadeh lwn. PP* [2000] 3 CLJ 553 FC diikuti.)

[3] Dalam kes semasa, tidak terdapat sebarang keterangan mengenai milikan sebenar pada pihak defendan dan hakim perbicaraan juga tidak membuat satu dapatan yang nyata dan jitu berkenaan milikan tersebut. Sebaliknya, hakim bicara telah menggunakan dan bergantung kepada anggapan milikan dibawah s. 37(d) ADM bagi memakai anggapan mengedar dibawah s. 37(da) ADM terhadap defendan. Ini merupakan satu salah arah yang serius dan merupakan sesuatu yang membawa padah pada pertuduhan mengedar dadah merbahaya dibawah s. 39B ADM.

Sabitan dan hukuman dibawah s. 39B ADM dibatalkan dan diketepikan; defendan didapati bersalah memiliki dadah dibawah s. 12(2) ADM dan dihukum 16 tahun penjara dan 10 sebat rotan dibawah s. 39A(2) ADM.]

Case(s) referred to:
Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(foll)***
Haryadi Dadeh v. PP [2000] 3 CLJ 553 FC ***(foll)***
Mohd Said Samad v. PP [1998] 2 CLJ 161 FC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), (da), 39A(2), 39B(1)(a), (2)

For the appellant/defendant - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar
For the respondent - Abdul Wahab Mohamed

[Appeal from High Court Federal Territory; Criminal Trial No: 45-8-96]

Reported by Gan Peng Chiang

JUDGMENT

Mokhtar Sidin JCA:
In this appeal, the appellant was charged and convicted under s. 39B of the Dangerous Drugs Act 1952 by the High Court. He was then sentenced to death. Being dissatisfied with that decision, the appellant appealed to this court.

The facts as found by the learned trial judge were, at about 12.40am on 22 March 1996, acting on information received, ASP Baljeet Singh led a police party from the Narcotics Division of the Police District Headquarters, Dang Wangi to the railway station at Jalan Sultan Hishamuddin, Kuala Lumpur. In front of the railway station the police party saw a taxi bearing the registration number HW 9677 parked in front of a public telephone kiosk. To prevent the taxi from getting away, ASP Baljeet stopped his car in front of the taxi. ASP Baljeet and his men came out of his car and approached the taxi. In the taxi he saw a person by the name of Alias bin Putih seated at the driver's seat while the appellant was seated in the passenger's seat next to him. ASP Baljeet then identified himself as a police officer and conducted a search on Alias bin Putih. From the trousers pocket of Alias bin Putih, ASP Baljeet found a small plastic packet suspected to contain heroin and RM1,200 cash. When ASP Baljeet was conducting the search on Alias bin Putih, the appellant was guarded by Sgt. Major Khabri bin Dollah. After searching Alias bin Putih, ASP Baljeet went over to the appellant and conducted a search on him. From the waist of the appellant, ASP Baljeet found a newspaper package containing small plastic packets. From the right side pocket of the appellant's track suit, ASP Baljeet recovered another newspaper package containing 50 small plastic packets while from the left side pocket he recovered three small newspaper packages containing 30 small plastic packets. He then continued his search into the

pockets of the appellant's trousers where he recovered from each side 20 small plastic packets. ASP Baljeet suspected the small plastic packets to contain drugs. The chemist, Encik Chan Kee Bian, who did the test on the contents of the plastic packets found the contents to be heroin, the net weight of which was 69.02 grammes.

In coming to the conclusion that the appellant was in possession of the said drug, the learned judge in his judgment stated:

> Jelas daripada keterangan yang ada, Tertuduh mempunyai milikan dan kawalan ke atas bungkusan-bungkusan dadah heroin yang dijumpai daripada badan dan pakaiannya itu. Oleh itu anggapan statutori di bawah seksyen 37(d) Akta Dadah Berbahaya 1952 terpakai bahawa Tertuduh mengetahui jenis barang yang diperolehi daripada pinggang, poket baju track dan poket seluar yang dipakainya itu adalah heroin kecuali dibuktikan sebaliknya.

From the above passage, it is clear to us that the learned judge invoked the presumption under s. 37(d) of the Dangerous Drugs Act 1952 (the Act) in order to come to the conclusion that the appellant was in possession of the heroin. Further down in his judgment the learned judge stated as follows:

> Dengan itu juga, oleh kerana heroin yang dijumpai daripada Tertuduh melebihi 15 gram, maka anggapan di bawah seksyen 37(da) Akta Dadah Berbahaya 1952 juga terpakai bahawa Tertuduh sedang mengedar dadah heroin tersebut mengikut takrif di bawah seksyen 2 Akta Dadah Berbahaya 1952, kecuali dibuktikan sebaliknya.

In order to come to the conclusion that the appellant was trafficking in heroin, the learned judge invoked the presumption under s. 37(da) as can be seen from the above passage of his judgment. Under s. 37(da) of the Dangerous Drugs Act, if a person is found to be in possession of heroin in excess of 15 grammes, he is presumed to be trafficking in the drug. In the present appeal, the heroin found on the appellant was 69.02 grammes, far exceeding the permissible 15 grammes.

The Federal Court in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170, made it clear that the presumptions under ss. 37(d) dan 37(da) could not be invoked in order to find a person guilty of the offence of trafficking in drugs. In that case it was held that:

> To come to the presumptions of possession and knowledge under s. 37(d) of the Act, one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the

wordings of the two subsections, such an intention of the Parliament is clear, which here is not. *Therefore, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s. 37(d) must bear the same meaning as the word 'found' in s. 37(da). Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s. 37(d).*

Moreover, to read the presumption of possession provided in s. 37fd) into s. 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s. 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof. (emphasis added)

That decision made it clear that if a person is presumed to be in possession of any dangerous drugs under s. 37(d) of the Dangerous Drugs Act, then the presumption under s. 37(da) of the Act could not be invoked to find him guilty of trafficking. In other words, if the presumption of possession under s. 37(d) of the Act has been invoked, the prosecution must prove by direct evidence of actual trafficking. On the other hand, where the prosecution has satisfied the court that a person is found to be in actual possession, that is custody and control of the drug without invoking the presumption under s. 37(d) of the Act, and the drug found on him is more than the permissible weight, then the presumption of trafficking under s. 37(da) could be invoked. To be fair to the learned trial judge, when he gave his decision in the present appeal, he was not aware of the decision of *Muhammed bin Hassan*. In view of the decision in *Muhammed bin Hassan*, it is clear to us that the learned judge was in error when he invoked the presumptions under ss. 37(d) and 37(da) of the Act in order to find the appellant guilty of trafficking.

The learned Deputy Public Prosecutor (DPP) urged this court to look into the evidence as a whole. It was contended by the learned DPP that there were evidence to show that the appellant had knowledge of the heroin found on him. From the evidence, it was shown that a small plastic packet containing heroin was found on the waist of the appellant. As such he had knowledge that the small plastic packet contained heroin. That small plastic packet was similar to

other plastic packets found in the appellant's track suit and trousers pockets. With the greatest respect to the learned DPP, there was no evidence to show that those plastic packets were similar to the one found on his waist. What the learned DPP attempted to do was to ask this court to assume that those plastic packets were similar to each other and as such the appellant had knowledge of the contents to be heroin. Unless there are direct evidence as to the similarity we are not willing to make that assumption. In our view, the small transparent plastic packets were common and were readily available. There is no evidence to show that those plastic packets found on the appellant were unique and special compared to those which were readily available in the shops. There were no special markings on those small plastic packets which could distinguish them from the other plastic packets.

The Court of Appeal in *Abillah bin Labo Khan v. Pendakwa Raya* [2002] 3 CLJ 521 held that mere finding of small plastic packets containing drug in the jacket of an accused person would not be sufficient proof of positive possession. In that case the appellant was stopped at a road block while riding a motorcycle. He was wearing a jacket which was zipped all the way to the collar. He was asked to remove his jacket, where after a search was conducted, heroin weighing 81.58 grammes in small plastic packets was found. In the High Court he was found guilty and sentenced to death for trafficking. On appeal to this court, the appeal was allowed on the ground that the learned judge had invoked the double presumptions in order to establish trafficking. The Court of Appeal said there was no finding of positive possession by the learned judge at the close of the prosecution's case although there was such finding after he dealt with the appellant's defence. Gopal Sri Ram JCA, delivering the judgment of the court, at p. 527 said:

> There are two other submissions made by the learned deputy that require to be addressed. The first is her argument that the trial Judge did in fact make a specific finding to the effect that the appellant was found in possession of the drugs in question. However, it is to be observed that this finding was made in the concluding passage of his judgment, after he had considered and dealt with the appellant's evidence in defence to the charge. That in our view is, with respect, wholly inadequate. The direction, if any, should have been administered by the trial Judge unto himself when he was considering the evidence led by the prosecution. In other words, it should have been done at the close of the prosecution's case. ...

In the present appeal, the trial judge did not make any finding of positive possession at all but relied on the presumption under s. 37(d) of the Act to establish possession.

In *Haryadi bin Dadeh v. Public Prosecutor* [2000] 3 CLJ 553, the appellant was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s. 39B(2) of the Act. The trial judge found sufficient evidence showing that the appellant had custody and control of 251.06g of cannabis. He then invoked the presumption of possession and trafficking under s. 37(d) and 37(da)(vi) of the Act (ie, presumption upon presumption) against the appellant who was called to enter his defence. The judge concluded that from the totality of the evidence adduced, it was clear that the appellant was trafficking the cannabis as there was no evidence suggesting that the cannabis was for his own use. Accordingly, the judge entered a conviction against the appellant for trafficking and sentenced him to death. On appeal to the Court of Appeal, the learned DPP pointed out there was the testimony of PW1, the eyewitness, who saw the appellant alone in the bathroom rolling the ganja leaves and fleeing upon noticing the presence of the police in the shophouse. The Court of Appeal agreed with the DPP that the learned judge was justified in concluding that the appellant was in possession of the cannabis and had correctly invoked the presumption of trafficking under the Act. The Court of Appeal also agreed with the DPP that the learned trial judge had not contravened the Federal Court's decision in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 and *Mohd. Said bin Samad v. Public Prosecutor* [1998] 2 CLJ 161 and dismissed the appeal. On appeal to the Federal Court, the appeal was allowed and the conviction and sentence for trafficking was set aside and was substituted for being in possession under s. 6 of the Act. He was sentenced to ten years imprisonment and ten strokes of the rotan. Chong Siew Fai CJ (Sabah & Sarawak) delivering the judgment of the court at pp. 558 and 559 stated:

> Before us, the sole issue was the invocation of presumption upon presumption. Relying on *Muhammed bin Hassan,* counsel for the appellant submitted that the learned trial judge had erred in invoking the double presumptions. Though conceding that there has been a finding of the appellant being in custody and control of the 251.06g of ganja, counsel contended that the learned trial judge had seriously misdirected himself by invoking the presumption of possession under s. 37(d) of the Act. It was also argued that since there had been no finding of actual possession of ganja, the presumption of trafficking under s. 37(da) of the Act could not be invoked. ...
>
> For the respondent, the learned deputy public prosecutor, whilst pointing out that the learned trial judge had found possession, conceded that the learned trial judge had, in his judgment, also relied on s. 37(d) of the Act (presumed possession) to invoke s. 37(da) of the Act (presumed trafficking).

Having considered the evidence adduced and the submissions of counsel for both sides, we unanimously allowed the appeal as aforesaid. The ratio decided in *Muhammed bin Hassan*, is clear. One cannot rely on the presumption of possession under s. 37(d) of the Act to invoke a further presumption of trafficking under s. 37(da) of the Act. In the instant case under appeal, the learned trial judge held that the appellant was in possession of 251.06g of cannabis. *It would have been in order if, based on the express finding of possession, he proceeded to invoke the presumption of trafficking under s. 37(da) of the Act. But this was not what he did. Immediately thereafter, he found the appellant in custody and control of the cannabis and held that therefore the presumption of possession under s. 37(d) of the Act applied. He then went on to say that likewise because the accused was in possession of more than 200g of cannabis, the presumption of trafficking under s 37(da)(vi) of the Act applied. Towards the conclusion of his judgment, the learned trial judge said, inter alia, that the appellant had failed to rebut the statutory presumption under s. 37(d) of the Act (presumed possession) and s. 37(da)(vi) (presumed trafficking) of the Act. By making a finding of* possession and then relying on the provision of presumed possession under s. 37(d) of the Act, the learned trial judge had seriously misdirected himself and leaves us in a serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s. 37(d) of the Act. The benefit of the doubt ought, in our view, be given to the appellant. (emphasis made).

Our observation of the above judgment makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption of possession under s. 37(d) of the Act. If a trial judge invoked s. 37(d) of the Act to establish possession even though there was evidence of actual possession and then went on to invoke s. 37(da) to establish trafficking, it would be a serious misdirection. We would like to stress this point because time and again, DPPs in their submissions before us have requested this court to look into the totality of the evidence to establish actual possession even though the learned trial judges in their judgments invoked the presumptions under s. 37(d) to establish possession and s. 37(da) to establish trafficking. Following the decision of *Haryadi bin Dadeh*, the Federal Court makes it very clear that even though there is evidence of actual possession on the part of an accused person, and despite that the learned judge invokes s. 37(d) to establish possession and then goes on to invoke the presumption under s. 37(da) to establish trafficking, the learned judge had misdirected himself and in such a situation an accused person should be given the benefit of the doubt. The accused person should be found guilty of the offence of possession only.

Turning to the present appeal, the learned judge in coming to the conclusion that the appellant was guilty of the offence of trafficking, invoked the double presumptions and as such had seriously misdirected himself. Furthermore, as we have stated earlier, there was no evidence of actual possession on the part of the appellant, which makes this case much weaker than the case of *Haryadi bin Dadeh.*

For the reasons we have stated above, we allowed the appeal by the appellant. The conviction and sentence for trafficking is hereby set aside. From the evidence, we agree with the learned judge that the prosecution had succeeded in invoking the presumption of possession under s. 37(d) of the Act due to the fact that the heroin was recovered from the waist, the trousers pocket and the pockets of the track suit belonging to the appellant. The net weight of the heroin found to be in possession of the appellant was 69.02 grammes. As such, we find the appellant guilty of an offence of possession under s. 12(2) of the Act and since the weight of the heroin exceeded the permissible weight of five grammes, he should be punished under s. 39A(2) of the Act.

Before sentencing him, the appellant in his mitigation stated that at the time of his arrest he was 41 years of age and now he is 47 years of age. This is his first offence. He asked for his sentence to be imposed from the time of his arrest.

After considering the mitigation and the seriousness of the offence we are unanimous that the appropriate sentence to be imposed on the appellant is sixteen (16) years imprisonment from the date of arrest and ten (10) strokes of the rotan.